Supreme Court, U.S.
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No. 95-560

In The

Supreme Court of the United States

October Term, 1995

BURLINGTON AIR EXPRESS, INC.,

Petitioner,

v.

GEORGIA-PACIFIC CORPORATION and
BTL SPECIALTY RESINS CORPORATION,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Georgia**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

In the instant case, Georgia courts allowed damages, measured as attorney's fees, against a corporation doing business in Georgia for its conduct toward two of its customers, based on evidence of bad faith and stubborn litigiousness associated with its customers' claims for insurance proceeds on lost air cargo, under the authority established by O.C.G.A. § 13-6-11. A judgment for attorney's fees under O.C.G.A. § 13-6-11 was ancillary to but independent of the underlying claim for the insured value of the lost air cargo. The Georgia courts did not authorize attorney's fees against an air carrier under the Interstate Commerce Act, the Airline Deregulation Act, federal common law, or any other federal law, as alleged by Petitioner. Thus, Petitioner's questions presented for review are not the appropriate subject of certiorari to this Court, as irrelevant to the holdings of the Georgia courts.

PARTIES TO THE PROCEEDING

All parties to this proceeding and all parent companies are included in the caption of this case.

Petitioner Burlington Air Express, Inc., is a Delaware corporation.

Respondent Georgia-Pacific Corporation is a Georgia corporation.

Respondent BTL Specialty Resins Corporation is a Delaware corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT (REASONS FOR DENYING THE WRIT) 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Fidelity National Bank v. Jeffrey M. Kneller, P.C., 194 Ga. App. 55, 390 S.E.2d 55 (1989) 5

G. E. C. Corp. v. Levy, 126 Ga. App. 604, 191 S.E.2d 461 (1972) 5

Jordan Bridge Co. v. I. S. Bailey, Jr., Inc., 164 Ga. App. 124, 296 S.E.2d 107 (1982) 5

McDonald v. Wynne, 194 Ga. App. 459, 390 S.E.2d 890 (1990) 5

Salisbury Labs., Inc. v. Merrieux Labs., Inc., 735 F. Supp. 1555 (M.D. Ga. 1989), *aff'd*, 908 F.2d 706 (11th Cir. 1990) 5

STATUTE

O.C.G.A. § 13-6-11 ..... *passim*

STATUTES INVOLVED

O.C.G.A. § 13-6-11 (Supp. 1995):

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

STATEMENT OF THE CASE

Respondents entrusted several packages to Petitioner, a national air cargo carrier, for shipment. The packages contained industrial screens composed of silver. The screens were used as a catalyst component in the production of formaldehyde. The screens were being shipped for recycling.

Respondents paid Petitioner to insure the shipments for their declared values. Petitioner lost all shipments and refused to pay the declared, insured values therefor.

Respondents successfully sued Petitioner for the insured values of these shipments. As a defense, Petitioner first argued that the Interstate Commerce Act applied to it, then that it was deregulated therefrom, then that the Act never applied. Petitioner's arguments depended on the expediency of the Act for Petitioner's defenses to Respondents' claims. The judgment for the insured values of the shipment was affirmed in relevant part, and is not the subject of Petitioner's request for review by this Court. From a review of Petitioner's

"Questions Presented for Review," perhaps Petitioner should have sought certiorari to this Court on the judgment for the insured values of these shipments.

Because Petitioner made Respondents' case so expensive to pursue, due to Petitioner's aggressive defense and appellate campaign, Respondents pursued their claim on Petitioner's bad faith and stubborn litigiousness under Georgia authority set forth in O.C.G.A. § 13-6-11. As the rationale for denying Respondents' claims for the insured values of the lost shipments, Petitioner claimed its tariff prevented Petitioner from accepting for shipment *any* precious metal with a declared value over $500.00. Petitioner went so far as to quote the tariff in a letter to one of the Respondents, and to tender checks for the limited values for the shipments allegedly established by the tariff.

Respondents had no knowledge of Petitioner's tariff and had, in any event, identified the contents of the shipments, declared the values, and paid excess value charges for insurance, which shipments Petitioner then accepted. After Petitioner lost the shipments and refused to pay, Respondents requested, on numerous occasions, to be provided with a copy of the tariff. After much time and effort, and representations as to the applicability of the tariff to limit Petitioner's liability, Petitioner finally succumbed and supplied one of the Respondents with the tariff.

As the evidence before the Superior Court of Fulton County demonstrated, it turned out that the tariff did not provide a defense to Petitioner as it had been representing to Respondents. The tariff allowed Petitioner to ship

precious metals when the metal was functional rather than decorative, such as in manufactured articles. Yet, Petitioner made no apology and forced Respondents to sue. At trial, Petitioner came up with completely different responses for its refusal to pay, downplaying the initial tariff excuse.

Georgia law at O.C.G.A. § 13-6-11 allows a plaintiff to recover, as damages, attorney's fees and expenses of litigation for a defendant's independent bad faith or stubborn litigiousness within any contracted transaction. These damages are not awarded for mere refusal to pay. The Fulton County Superior Court, after a bench trial, found that Petitioner had violated this statute by its conduct toward Respondents. Thus, as damages, Respondents were awarded their attorney's fees and expenses, the relevant damages under O.C.G.A. § 13-6-11. This judgment was likewise affirmed by the Georgia courts, in full.

Petitioner quotes from the decision of the Georgia Court of Appeals concerning Respondents' judgment on the insured values of the shipments, *not from* the later decision affirming the judgment awarding Respondents' damages under O.C.G.A. § 13-6-11. Thus, contrary to Petitioner's representations, the Georgia courts have not ruled that attorney's fees are available against an air carrier under the Interstate Commerce Act or any other federal law. The attorney's fees were awarded for the ancillary bad faith and stubborn litigiousness Petitioner brought to bear upon Respondents in the business dealings between the parties. Petitioner, as any other Georgia citizen or entity operating its business in the State of Georgia, is subject to Georgia laws.

SUMMARY OF THE ARGUMENT

The Georgia courts have not awarded attorney's fees against an air carrier under any federal authority. Only Petitioner's independent and ancillary bad faith in the transaction brought about such a judgment under a state statute applicable to all Georgia citizens and businesses operating in Georgia. Thus, no federal question is presented.

ARGUMENT

(REASONS FOR DENYING THE WRIT)

The Georgia courts did not award Respondents their attorney's fees and expenses against Petitioner under the Interstate Commerce Act, the Airline Deregulation Act, federal common law, or any other federal authority. A review of the Georgia decisions discusses the appropriate federal law to apply to Respondents' claims, and Petitioner's defenses, *only* on the insured values of the lost shipments. If Petitioner had wanted a clarification of the law on a claim against an air carrier for lost shipments, the making of and interpretation of shipping contracts, the limitation of tariffs, and other defenses associated with air cargo carriers, Petitioner should have sought certiorari on the appropriate judgment.

In any event, no matter whether Petitioner was never covered by the Interstate Commerce Act, or has been deregulated therefrom, it is clear that the absence of such regulation can only lead to the conclusion that federal

law has not supplanted state law as to all areas of business conduct by air carriers.[1] Importantly, however, Respondents' claim for attorney's fees was not pursuant to any air cargo contract, the main claim, but was ancillary thereto, based on Petitioner's independent, wrongful conduct toward Respondents in violation of O.C.G.A. § 13-6-11. This bad faith is not inherent in the making, enforcement, or interpretation of a contract with an air carrier or any defenses thereto.

Under O.C.G.A. § 13-6-11, bad faith "must have arisen out of the transaction on which the action is predicated." *McDonald v. Wynne*, 194 Ga. App. 459, 390 S.E.2d 890 (1990). Actually, "there may be bad faith in *carrying out* the provisions of the contract sufficient to support the award." *Jordan Bridge Co. v. I. S. Bailey, Jr., Inc.*, 164 Ga. App. 124, 126, 296 S.E.2d 107 (1982) (emphasis added). Mere refusal to pay does not allow recovery under O.C.G.A. § 13-6-11. *G. E. C. Corp. v. Levy*, 126 Ga. App. 604, 607, 191 S.E.2d 461 (1972). Moreover, "[d]espite the existence of a bona fide controversy as to liability, a [fact finder] may find that defendant 'acted in the most atrocious bad faith in his dealing with the plaintiff.' [Cits.]." *Fidelity Nat'l Bank v. Jeffrey M. Kneller, P.C.*, 194 Ga. App. 55, 63, 390 S.E.2d 55 (1989). This Code section is not even confined to attorney's fees and costs, but allows recovery for the broader term "expenses of litigation." *Salisbury Labs., Inc. v. Merrieux Labs., Inc.*, 735 F. Supp. 1555, 1574-75 (M.D. Ga. 1989), *aff'd*, 908 F.2d 706 (11th Cir. 1990).

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[1] For example, if one of Petitioner's trucks struck a pedestrian, state law of negligence and respondeat superior would apply to Petitioner.

Under this clear and well-established state authority, the Fulton County Superior Court found Petitioner liable for its atrocious conduct in dealing with Respondents, independently of the terms of the air cargo contract, interpretation thereof, and defenses thereto. Every Georgia citizen and those that do business in the State of Georgia are subject to this law, defining what is inappropriate business conduct in Georgia.

This case does not meet the requirements for certiorari to this court set forth in Rule 10 of the Supreme Court Rules. Damages for bad faith and stubborn litigiousness under state law O.C.G.A. § 13-6-11 are matters applicable to all Georgians and are not a matter of federal concern. There is no federal question presented. If Petitioner does not like Georgia law, it should take care not to act in bad faith, or it should not do business in Georgia. The "possible conflicting authority" as to the Interstate Commerce Act's application to air carriers *vel non* is not presented in Petitioner's appeal of the attorney's fees judgment. If Petitioner desired the Court to resolve this conflict, a possible ground for certiorari under Rule 10 of this Court, Petitioner should have sought review of the first judgment on the insured values of the lost shipments, where the issue was somewhat in controversy over Petitioner's numerous defenses based on the language of the shipping papers and the alleged restrictions of the tariff.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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